

Case No.: 23-cv-03205-VC

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIAIn re: THAI MING CHIU,
Debtor.**APPELLANT'S RESPONSE TO
APPELLEE'S MOTION TO
DISMISS**SIMON THAI MING CHIU,
Plaintiff and Appellant,[On Appeal from final order of Northern
District Bankruptcy Court (San
Francisco), the Honorable Hannah L.
Blumenstiel presiding, Adversary
Proceeding No. 22-03114; Related
Bankruptcy Proceeding No. 22-30405]

v.

CHARLES LI,
Defendant and Respondent.

Appellee's motion to dismiss incorrectly argues that, after the due date passed for his opening brief to be filed, it was incumbent upon him to seek relief based upon excusable neglect under Federal Rule of Bankruptcy Procedure 9006(b)(1). (Mot. At 6-7.) Federal Rule of Bankruptcy Procedure 8018(a)(4) permits a party or the Court to move to dismiss the appeal after the due date has passed. However, if no motion to dismiss is pending, or no dismissal has been entered, there is no requirement that appellant seek relief under Rule 9005(b)(1) before filing the opening brief.

Thus, appellant did not have to move for relief from a default or request leave to file a late brief, based upon excusable neglect under Rule 9006(b)(1) because, before appellant filed the opening brief, neither appellee nor the Court sua sponte moved to dismiss the appeal under the Federal Rules of Bankruptcy Procedure 8018(a)(4). Appellant's Brief was accepted for filing without appellant having to make a motion under Rule 9006(b)(1).

After appellant's brief was filed, appellee's counsel requested that appellant's

1 counsel grant an additional 30 days to file appellee's brief, to which appellant's
2 counsel agreed. Appellee never mentioned that he was contemplating a motion to
3 dismiss before negotiated additional time to file his brief. The Court accepted the
4 parties' stipulation and ordered a modified briefing schedule.

5 After an opening brief has been filed, "[t]he district court may excuse
6 non-compliance or grant specific other limits." *In re Drexel Burnham Lambert*
7 *Group, Inc.*, 142 B.R. 633, 636 (S.D.N.Y. 1992). Here, the Court granted specific
8 other time limits by modifying the briefing schedule. Once the Court modified the
9 briefing schedule, appellant's noncompliance with Rule 8018(a)(1) was excused, and
10 the issue of appellant's opening brief being timely filed was moot.

11 In *In re Drexel Burnham Lambert Group, Inc.*, *supra*, the court held that
12 appellant's failure to file a brief for over a month after it was due was "alone . . . not
13 sufficient to warrant dismissal." 142 B.R. at 636. The court there found that
14 appellant had an excuse for its tardiness "albeit weak and rather late itself." *Id.*¹

15 Here, the undersigned was not attorney of record at the time that the brief was
16 due. Indeed, the undersigned certifies that he had no knowledge this case even
17 existed until December of last year. The undersigned has been informed that there
18 was some confusion as to whether the case was going to proceed in the Bankruptcy
19 Appellate Panel, and that former counsel was waiting for a briefing schedule. In any
20 event, appellee does not argue that he is suffering prejudice from the delay, which he
21 has further extended by his being granted additional time to file his appellee's brief.

22 Appellee argues that appellant's late filings in a prior bankruptcy case and
23 unauthorized filings through his former attorney in the underlying bankruptcy case
24 should be held against him when it comes to the late filing of his opening brief.

25
26
27 ¹ The undersigned realizes his response to appellee's motion is late by a few
28 days. He did not see the email alerting him to the docketing of appellee's motion
until yesterday afternoon. He was preparing for a jury trial all week in Riverside
County Superior Court and was distracted by an email coming in from the State
Court of Appeal the same time as the one from the District Court.

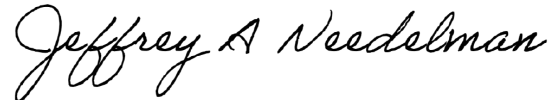
1 (Mot. At 4.) This Court should reject this line of argument. These prior acts are
2 more prejudicial than probative because they involved other issues than mere
3 tardiness. Here in contrast, there is essentially mere tardiness, without any other
4 substantive irregularity or prejudice to the opposite side.

5 There is a strong public policy behind the Federal Rules of deciding cases on
6 their merits. *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1128 (9th Cir.
7 2017). Appellee is trying to avoid dealing with the merits of appellant's appeal by
8 distracting the Court with these prior events.

9 For the foregoing reasons, the Court should deny the motion to dismiss.

10 DATED: February 16, 2024

Respectfully Submitted,

11 

12 _____
13 Jeffrey A. Needelman
14 Attorney for Plaintiff and Appellant
15 Simon Thai Ming Chiu
16
17
18
19
20
21
22
23
24
25
26
27
28